United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1360

To be argued by
ALVIN E. ENTIN

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P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS ZAMMAS,

Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLANT

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Preliminary Statement

THOMAS ZAMMAS appeals from a judgment of conviction of the United States District Court for the Southern District of New York (The Hon. Constance B. Motley, presiding).

The twelve count indictment in this case named three defendants: William Rodman, William Aiken and the Appellant. Each defendant was named in each count. The first six counts charged mail fraud. The second six counts charged the defendants with violating Section 77 q (b) of the Federal Securities law.

Appellant was convicted of all twelve counts.

Appellant was sentenced to a prison term of eighteen months on all twelve counts, to be served concurrently.

Upon consent of the Government and the Court, the Appellant is presently free on bail pending this Appeal.

Statement of Facts

After the preliminary proceedings were concluded, Stanley Perlmutter commenced his testimony. Perlmutter was a registered representative at Continental Securities in the year 1972. Mr. Perlmutter had met the defendant, Zammas while working at Executive Securities in the year 1971. His first contact with the defendant, Rodman, was in the Spring of 1972.

During the Spring of 1972, Perlmutter had a conversation with Zammas concerning the stock of Power Conversion, Inc. According to Perlmutter, Zammas said, "We have a very good situation here in Power Conversaion and do you think Eric Aiken would do a write up?" Perlmutter told Zammas that because of the background surrounding the Aiken-Zammas relationship, he doubted Eric "Would touch it at all. . ." Zammas indicated that it would be worth his while. Perlmutter agreed to mention this to Aiken.

According to Perlmutter, Aiken's immediate reaction was, "I don't want to have anything to do with it." (Tr.67) "I don't want to have anything to do with Tom Zammas again." (Tr.69) This initial reaction of Aiken was based upon a problem they (Aiken and Zammas) had in the past. During August of 1972 favorable articles concerning Power Conversion appeared in several publications. Perlmutter then had a second conversation with Aiken wherein he asked Aiken to reconsider his position. Perlmutter pointed out to Aiken that they could earn some money if an article was written. Aiken agreed to look into the stock.

According to Perlmutter, someone at Value Line already had a file on the Power Conversion stock issue.

Aiken called a day or so after the second conversation and asked for a meeting with Zammas. A meeting was held in late August or early September in an Italian restaurant on the East side of Manhattan.

After a discussion about some prior dealings where Aiken did not get paid, Zammas indicated he would guarantee payment in this situation. As part of the guarantee, 1,000 shares of Power Conversion stock would be given to Aiken as collateral. Fifteen thousand dollars in cash was to be paid upon the writing of the article. There was also to be "Some type of play on the profits on the 1,000 shares of collateral stock".

Aiken agreed to proceed when he had possession of the shares of stock. It was at this time that Perlmutter left the restaurant. Perlmutter testified that he later received from Aiken, $3,500.00 in cash and a forgiveness of a $4,000.00 debt. This was paid about one week after the article was published.

On cross-examination, Perlmutter was asked about several dealings he had on stocks other than those mentioned in his agreement with the Government. Perlmutter, in most instances, invoked his Fifth Amendment privilege and declined to answer questions.

When questioned about the initial meeting with Zammas, Perlmutter recalled that it occurred in April, May or early June of 1972. After Aiken's original rejection of the article, Perlmutter approached him again, in August of 1972. Zammas did not solicit this second effort of Perlmutter. Perlmutter then approached Zammas, after the second meeting with Aiken, and, at that time, indicated Aiken's willingness to do the article.

Perlmutter admitted that Aiken told him he, "Could never guarantee any article would be published". Everything had to meet with the approval of his boss. (Tr.144)

William Aiken was the executive editor of Value Line Selection and Opinion, a publication of Arnold Bernhard and Co., Inc. in the year 1972. Prior to his testifying, Aiken had pled guilty to one count of fraud in connection with the case against the defendant, Zammas and, had further entered into an agreement with the Government concerning his other criminal involvements. This agreement was entered into evidence and read into the record. (Tr.166-168)

Aiken then testified that he knew and had engaged in business dealings with Stanley Perlmutter. In September of 1972 Perlmutter came to him with a proposition regarding a company called Power Conversion. (Tr.169) Perlmutter told him that Zammas wanted a write-up on Power Conversion. (Tr. 169) Aiken refused the deal at that time.

This refusal was predicated upon a prior involvement with the defendant, Zammas, in a transaction concerning the stock of Casa Bella Imports, Inc. (Tr. 169) Counsel for Zammas objected to the introduction of testimony relating to Casa Bella. Further, he moved that the answer of the witness concerning Casa Bella be stricken from the record. It was defense counsel's position that the Casa Bella situation was not a prior similar act. The Government argued that it was. The Court allowed the testimony to be admitted as a prior similar act. (Tr.170-174)

Aiken testified that he finally agreed to go to a meeting with the defendant. He then described the Casa Bella situation which had occurred in 1970. (Tr. 181-184)

Aiken met with Zammas and Perlmutter in September, 1972 at the La Fortuna Restaurant. At that meeting, Zammas offered him Fifteen Thousand Dollars in cash and an override on 20,000 shares of Power Conversion stock. According to the witness, he requested guarantees and was told he would be given 1,000 shares of the stock of the company to hold as security for the payment. (Tr.184-187)

The transfer of shares and payment of $1,000 was to take place that evening. Accordingly, Aiken accompanied Zammas to an apartment on 35th and Lexington Avenue where the transfers took place. (Tr. 187-189)

Aiken prepared an article on Power Conversion and submitted it for publication. (Tr. 190) One day prior to the

official publication, Aiken advised Zammas that the article was coming out and arranged a meeting for that night. At approximately 11:30 PM the witness, his fiance, the defendant and his girlfriend met at the Ground Floor Cafe, where the witness testified monies and copies of the article were exchanged in the men's room. (Tr. 192-195) Over objection, Aiken was allowed to testify that the article written by him was favorable.

Aiken recalled another meeting with the defendant, Zammas, several months after the article. According to Aiken, the defendant stated at that meeting that, "Well, I got wiped out, I had a lot of puts I had to walk away from. The S.E.C. is after me, but you don't have to worry because I can't do anything, you know, - - I can't do anything to you without bearing to myself".

On cross-examination, Aiken testified to his agreement with the Government. He admitted lying to the Government when he first agreed to testify in 1973. (Tr. 218) He further admitted committing perjury before the S.E.C. in a Philadelphia hearing.

Aiken admitted that he never received money from the defendant, Zammas on the Casa Bella deal. Aiken recalled the first meeting with Stanley Perlmutter concerning Power Conversion taking place in September, 1972. (Tr.242-246)

In response to questioning, Aiken admitted that he could not guarantee the publishing of an article in Value

Line. Further, he could not guarantee publication of an article to the defendant on the night of their first meeting. Aiken could never guarantee the publication of an article since Arnold Bernhard himself had the final authority as to all articles to be published. Berhard was the publisher of Selection and Opinion. (Tr. 264-267)

In conclusion, Aiken admitted that the defendant, Zammas, had no idea an article was being published until after the actual publication of the magazine. (Tr.277)

Pericles Constantino had formerly been President of Provident Securities, a brokerage house, before being barred from the Securities Industry for violations of Federal Securities laws. Constantino was able to identify the defendant, Rodman, as a market maker in Power Conversion. Rodman and he had a meeting during the summer of 1972 relating to a stock known as Fantastic Fudge. During this meeting, Constantino asked the defendant, Rodman, how he had managed to keep the selling price of Power Conversion stable. Rodman informed Constantino that it had cost him to have an article published in Value Line. (Tr. 340)

On cross-examination, Constantino recalled the conversation taking place a month or two prior to the publication of the article itself. (Tr.342)

Constantino admitted perjuring himself in an S.E.C. investigation that related to Fantastic Fudge. Constantino was testifying in order to comply with an agreement wherein he promised to cooperate with the Government. Constantino did not

know the defendant, Zammas.

Susan Aiken, the wife of Eric Aiken, recalled the September meeting. She and Mr. Aiken went to the Ground Floor restaurant to meet Zammas. Her husband had informed her that he was there to pick up a sum of money. (Tr.424) The defendant, Zammas, and Stephanie Palumbo arrived after the Aikens. Mr. Aiken gave Zammas an envelope with Power Conversion articles contained therein. When the Aikens departed the restaurant, Eric Aiken had Fourteen Thousand Dollars in cash in his coat pocket. During cross-examination, Mrs. Aiken admitted signing a false affidavit.

Robert Wymbs met the defendant, Zammas in the office of Henry Goldfarb. Wymbs was introduced to Rodman by Zammas in the offices of C.I. Oren. Wymbs visited the office of C.I. Oren almost daily during the period of August and September, 1972 (Tr. 440)

It was during this period that Wymbs bought and sold the stock of Power Conversion, Inc. Wymbs was informed by Zammas that Power was an expanding and growing company which would be a good investment. Rodman also indicated to Wymbs that the stock in Power was on its way up. (Tr. 442)

Early in September of 1972, Wymbs overheard a phone conversation wherein the defendant, Rodman was asking an unidentified person as to when the article would be finished for publication. (Tr. 445) Thomas Zammas and Irving Orenstein

were present while Rodman was on the telephone.

Another conversation took place approximately one week later in an apartment in Manhattan. Present were Rodman and his girlfriend, Denise Gennaro. A third conversation occurred several days later between Rodman, Zammas and Denise Gennaro. (Tr.446) It was during this third conversation that Rodman produced an envelope with approximately Five thousand dollars in cash. Wymbs stated that this money was produced after it was ascertained that the article in question was ready to be published. The money was to be given to someone at Value Line to publish the article.

On cross-examination, Wymbs testified that he first heard about an article coming out in Value Line in late August, 1972. Wymbs was aware of a Five thousand dollar payoff to someone at Value Line to get the article published. (Tr. 546)

Irving Orenstein, President of C.I. Orin and Co., was introduced to the public offering of Power Conversion by Thomas Zammas. Orenstein's company took in 20,000 shares of Power Conversion and distributed same to its customers. Some of these shares were bought back by C.I. Orin at the direction of Thomas Zammas. (Tr.661) Orenstein was told there was going to be a write-up in Value Line by either Zammas or Rodman. He wasn't sure which of the defendants informed him of the article. (Tr. 666)

Alan Umbogy met with Rodman and Zammas on September 27, 1972 at Wolf's Coffee Shop. It was at this time that Rodman showed Umbogy a copy of the article in Value Line that Zammas

had allegedly just finished arranging for. According to Umbogy, the article was to hit the street that day. (Tr.680)

Umbogy took a copy of the article he was given to his home. This was subsequently delivered to the U.S. Attorney's office and was entered into evidence.

During the third week of September, 1972, Rodman asked Umbogy, during a telephone conversation, to purchase some shares of Power because an article was scheduled to be published in Value Line. This phone conversation took place on the day prior to Umbogy being given the article he previously testified to. (Tr. 707)

After being shown a copy of the Value Line article, Umbogy could no longer be sure that his meeting with Rodman and Zammas took place on the 27th. The copy of the article given to Umbogy was a xerox copy of the article that was to hit the street on the day of the meeting. (Tr.775) None of the parties were making a secret about the article coming out. Umbogy was never told that the article had been paid for.

Leonard Flocco of the National City Bank testified that on or about September 18, 1972, Thomas Zammas had a conversation with him at the bank. The conversation related to a secured loan. It was during this conversation that Mr. Zammas apparently indicated an article would be written concerning the Power Conversion stock. (Tr.831) The memoranda prepared by Flocco were introduced into evidence.

Stephanie Palumbo was with the defendant, Zammas, when he met with Eric Aiken and his fiance. The meeting took

place at the Ground Floor restaurant. (Tr.927) At dinner the two men left the table and were apparently gone for some period of time. (Tr.928) Miss Palumbo had no idea why she had gone to the meeting at the restaurant.

At the conclusion of Miss Palumbo's testimony, the Government rested its case. Defense counsel moved for a directed verdict of acquittal at the close of the case. This motion was denied by the Trial Court.

Edward J. Crooker, was employed by Value Line Selection and Opinion as the Comptroller in September of 1972. Exhibit L was the list of officers and directors of Arnold Bernard & Company, Inc. during 1972. Crooker identified the defendant's Exhibit I as an issue of Selection and Opinion dated October 16, 1970. On the back of this issue was a good faith disclaimer. This was the same good faith disclaimer that Value Line consistantly published throughout 1972. (Tr.960)

Crooker testified that if Aiken had reported the beneficial interest in the stock of Power Conversion to Arnold Bernhard & Company's legal counsel, pursuant to the good faith disclaimer, it would not have been disclosed to the public. (Tr. 973)

At the conclusion of this witness's testimony the defense rested. A motion for judgment of acquittal was tendered to the Trial Court. After a lengthy argument, the Court denied the motion. (Tr. 1011[1])

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[1]It was during this argument that the Court first indicated its opinion concerning the payment being a violation of State law.

During closing argument defense counsel argued that the payment in question was not a violation of Federal law if disclosure had been made. The payment itself, according to defense counsel, was perfectly legal under Federal law provided there was disclosure. The U.S. Attorney objected to this legal argument. It was at this point that the Court, in the presence of the Jury, stated as follows:

> "Yes, we went over that earlier and it was determined that under State law, if the Jury finds it to be true, it is not a legal act. The question is whether or not you are implying to the Jury that giving a payment under the circumstances here is legal.
>
> You said it was legal and we determined it was illegal under State law to give such a payment. The Federal law makes it illegal to give such a payment if it is not disclosed. So don't mislead the Jury by telling them it is a legal act if they find it did occur."

This comment by the Court led to a motion for mistrial. The motion was made after defense counsel concluded his closing argument. The Court denied said motion. (Tr. 1117)

The U.S. Attorney in his final remarks to the Jury indicated that the defendant, Zammas had done business with Aiken on other occasions. Mr. Lowe stated that the Casa Bella article, which had been brought up during the testimony, did not contain a disclosure. Defense counsel objected to this line of argument since the Casa Bella article had not been put into evidence. Defense counsel further pointed out that there was no evidence before the Jury which would indicate that dis-

closure had not been made. A motion to strike was tendered in behalf of the defendant. The Court denied the defendant's motions. Further, the Court indicated that the Jury could find from the evidence that there had been no disclosure in the Casa Bella article. (Tr. 1120-1121)

After all counsel had completed their closing arguments, another motion for mistrial was advanced to the Trial Court. Apparently Mr. Rodman's attorney, Mr. Berger, had information that Denise Gennaro had told the U.S. Attorney that Mr. Wymbs' testimony concerning her presence at a meeting was untrue. Miss Gennaro had told Mr. Lowe that she was not in the apartment in question during July, August or September of 1972. Mr. Berger indicated that Gennaro had advised him of this fact. The U.S. Attorney's office indicated that Mr. Berger's statements were essentially correct. The Government's position was, that since Mr. Berger was aware of Gennaro's testimony, the Government had no obligation to disclose same. The Assistant U.S. Attorney had assumed that Mr. Berger would relate this information to Mr. Zammas's counsel. Berger admitted that he had not disclosed this information to any of Zammas's attorneys. The Court withheld ruling on the Brady question and adjourned the case until the following morning.

The following morning the Court instructed the Jury as to the applicable law. Over objection, the Trial Court indicated that it would instruct the Jury that the "Casa Bella"

testimony could be considered as a prior similar act. (Tr.1151) This instruction was given by the Trial Court. (Tr. 1181) Further, instructions relating to the substantive crime were objected to by the defendant. (Tr. 1198-1200)

After the Jury retired, the Court heard argument concerning the claimed Brady objection. It was during this argument that counsel for the defendant, Rodman, admitted that he never informed counsel for the defendant, Zammas, of his knowledge concerning Ms. Gennaro's testimony. The Court heard lengthy argument wherein the Government conceded the fact that it had an agreement to supply Brady material to the defense. (Tr. 1230) After extensive argument, the Court ruled that the Government had no obligation to supply Brady material relating to Denise Gennaro.

A motion for mistrial relating to the Casa Bella argument was denied by the Trial Court.

After a lengthy deliberation, the Jury found the defendant guilty on all counts of the indictment. This Appeal follows:

ARGUMENT

POINT I

The Trial Court erred in making prejudicial comments during the closing argument which effectively denied the defendant Zammas his right to a fair trial.

It is essential to our entire system of justice that, while no defendant is entitled to a perfect trial, every defendant is entitled to a fair trial. In order to insure the fair and proper administration of justice, the Court must not, under any circumstances, either direct a verdict of guilty or tend to influence the jury in making its determination. During closing argument counsel for the defendant, Zammas, conceded the fact that a sum of money had been paid for the publication of the Value Line article in question. Although this concession was for the purpose of the argument, it was the position of the defense counsel that the mere payment of money for the publication of an article was not a violation of Section 77 q(b) of the Security Laws. During the motions for judgment of acquittal at the close of all the evidence, defense counsel had argued that the payment itself was not illegal.[1] The basis for the defendant's position on this point may be found elsewhere in this brief on the section dealing with sufficiency of evidence. Briefly, however, the Statute itself recognizes that payment may be made to financial magazines for the publication of articles concerning securities provided that disclosure of these payments be made in the article. Thus, the

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[1] It was at this time that the Court first expressed a position that the payment was illegal as a violation of State law. For this reason, the argument during the closing very carefully referred only to the fact that disclosure in the article would have made the payment legal insofar as the Federal Criminal Statutes were concerned.

payments are made illegal under Federal law only in such instances where there is nondisclosure of the payment in the article itself; caused by the defendant. This was what counsel for defendant Zammas was attempting to argue to the Jury at the time the Court made the prejudicial comment complained of hereunder.

Upon objection by the Government, the following colloquy took place:

> "THE COURT: Yes, we went over that earlier and it was determined that under State law, if a Jury finds it to be true, it is not a legal act. The question is whether or not you are implying to the Jury that giving a payment under the circumstances here is legal. You said it was legal and we determined it was illegal under State law to give such a payment if it is not disclosed. Don't mislead the Jury by telling them it is a legal act if they find it did occur.
>
> MR. ENTIN: I think I indicated it was legal under Federal law, your Honor.
>
> THE COURT: No, we had a discussion earlier which said that the statement should not be made to the Jury, which you have made."

This statement was made in the presence of the Jury.[1]

The colloquy cited above indicated that the Court had had a discussion earlier with counsel regarding the alleged

---

[1] Interestingly enough, there was nothing in the record to establish that a charge had been filed under the New YOrk Commercial Bribery Statute. In fact, no such charge was ever filed against the defendant, Zammas. Further, pursuant to the proof adduced at this trial, there would have been insufficient evidence to establish a violation of this Statute. See Article 180, Section 180 and June Fabrics v. Teri Sue Fashions, N.Y.S. 2d 877 (1948).

statement not to be made to the Jury. A careful reading of the record reflects that counsel followed diligently the Court's direction, which was to specifically indicate his argument applied to Federal law and not to State law.

Later, during the Government's rebuttal, the Assistant United States Attorney, as further proof that nondisclosure was intended by defendant, stated that there had been no disclosure in an article written by the defendant Aiken upon a company known as Casa Bella Imports. The Casa Bella Imports article was alleged to have been a prior similar transaction. When the defense argued, stating there had been no testimony of nondisclosure in the Casa Bella article and, that the article itself was never placed into evidence by the Government, the Court stated before the Jury as follows:

> "THE COURT: I told the Jury it is their recollection of the facts which control. The motion to strike is unnecessary. If they remember it differently, they remember it differently. I don't remember precisely what Mr. Aiken said, but it is the Jury's recollection that controls; and they might even infer that from all of his other testimony or the testimony relating to this, if they so desire, <u>that was also an illegal proposition</u>.
>
> There is evidence from which they could, if they believed the testimony of Aiken, infer that was so in that case, so it is unnecessary to strike it.
>
> Proceed." (Tr.1120-1121) (Emphasis supplied)

It is submitted on behalf of the defendant that the above comments were highly prejudicial and denied him a right to a fair trial. Defendant Zammas does not disagree with the

general proposition of law, that a Federal Judge is clearly more than a moderator or an umpire. However, it is submitted that when a Judge's participation in a trial reaches a point where it becomes clear to the Jury that the Court believes the defendant guilty; error has been committed. This is true whether the Judge's participation consists of "interrogating witnesses, addressing counsel, or some other conduct. . ." United States v. Nazzaro, 472 Fed. 2d 302 (2nd Cir., 1973).

In the Nazzaro case, Supra, this Court was constrained to reverse an importation of hashish conviction when the Trial Judge's conduct resulted in serious prejudice to the defendant. The conduct complained of therein was of the Trial Judge coming to "the aid of the prosecution witness during cross-examination . . .and. . .persistent questioning of defense witnesses, particularly the defendant. . ." The questioning by the Court clearly demonstrated a disbelief in the defendant's testimony.

After a review of the record, this Court reached the conclusion that the defendant had been denied a fair trial. The Trial Judge had crossed the fine line and had lost his appearance of impartiality. See also United States v. Guglielmini, 384 Fed. 2d 602 (2nd Cir. 1967).

Our Supreme Court in Quercia v. United States, 289 U.S. 466, 53 Sup. Ct. 698, 77 L. Ed. 1321 (1933) had occasion to discuss the limitations placed upon a Trial Judge's comments

during trial. In commenting upon testimony, the Court may not assume the role of a witness. Although the Court may analyze and dissect the evidence, it may not distort it or add to it. "Deductions and theories not warranted by the evidence should be studiously avoided." It is imperative that the Court appear neutral since "his slightest word or intention is received with deference, and may prove controlling". See also, United States v. Persico, 305 Fed. 2d 434 (2nd Cir. 1962) and United States v. DeSisto, 289 Fed.2d 833 (2nd Cir. 1961).

Another case worth mentioning is United States v. Woods, 252 Fed.2d 344 (2nd Cir. 1958). Woods was charged with violations of the Federal Narcotics laws. In his Appeal, he complained of a comment made by the Trial Court to the Jury. The Court informed the Jury that he personally believed that the defendant was guilty of the crime charged. This was held to be reversible error.

The comments of the Trial Court in the instant case, in light of the entire record, were unwarranted and prejudicial. Initially, the comment concerning the violations of the State Commercial Bribery Statute was unsupported by the evidence adduced at trial. The defendant was never charged with such a violation. The Government never provided evidence during the trial which would have supported such a violation. The Court, from the first day of the trial, treated the instant case as if it were a typical bribery situation. The Court never realized, or wanted to realize, the distinction between a simple bribery and the rather unique charge against the defendant in

the instant case. (There is only one other reported case of a violation of Section 77 q(b) of the Security laws in the United States, United States v. Amick 439 Fed.2d 351 (7th Cir, 1971)

The instant case was never a bribery situation. The Statute in question is not a bribery statute. It must be emphasized that the payment complained of by the Government is a legal payment if disclosure is made. Hence, the Court's references to commercial bribery were nothing short of inflammatory prejudicial comments.[3] The only purpose of such a comment was to inform the Jury that, in the Court's opinion, the defendant was guilty of at least something: irrespective of whether the "something" the defendant was guilty of was charged or not. Certainly no one can argue that the comments would not be highly prejudicial. Recalling the language of the Quercia decision cited, Supra, the slightest word or intention of the Court is received with deference and may prove controlling. This word of the Court could only be received with deference and the Jury was, at that time, put on notice that the Court believed the defendant guilty. Further prejudice can certainly be inured from the Court's statement that defense counsel was "misleading the jury". Certainly such a comment upon the "alleged behavior" of the defense counsel could seriously serve to weaken the defendant's credibility as well as that of

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[3] The best indication of the Court's apparent misunderstanding of the unique nature of the crime charged is found in a side bar conference during the defendant's case. See trial record 956 through 960.

his counsel; with the Jury. Here the Court has specifically accused a defense attorney of misleading the Jury, effectively vitiating any future impact of the words of the defense counsel. Comments of this nature can only serve to deprive a defendant of a fair trial. It is submitted that this was the purpose of the comment and it is also submitted that this was its effect.

The Court was not content to stop at this comment. The Court was later in the trial requested to rule on an objection concerning a putative article regarding a company known as Casa Bella Imports. Rather than making a simple ruling of sustained or overruled in the presence of the Jury, the Court felt it necessary to again cross the line and make comments to damage the defendant's position and to insure the conviction of the defendant Zammas. The Court's comments concerning Casa Bella Imports were unsupported by the testimony or, the physical evidence adduced at trial. The Government never attempted to introduce an article relating to Casa Bella Imports. The Defendant Eric Aiken never testified to a nondisclosure in that article. His only testimony with regard to an article concerning Casa Bella Imports was that defendant Zammas allegedly set up a deal where he was to have been paid by a party other than the defendant Zammas. There was nothing upon which an alleged nondisclosure could be inferred. In fact, what the Court did, was to infer a breach of law based upon the Court's determination that the law had

been breached in the case at bar. In fact, the Court said that if the Jury desired, it could infer that Casa Bella was an illegal proposition based upon the fact that the instant case constituted an illegal proposition. Thus, the Court's comment that the Jury could make such an inference implied that the defendant was guilty of this and other uncharged crimes. The case law is replete with examples that say a Court may properly comment upon the evidence, but there are no cases that say the Court can properly comment on something that is not the evidence. Nothing that the Court commented on with regard to the Casa Bella Import article is supported by any record.

In light of the entire record, the comments of the Court warrant a new trial, to enable the defendant to receive a fair trial.

POINT II

The Trial Court erred in improperly instructing the Jury as to the necessary elements of proof, and failed to give the properly requested legal instructions to the Jury

Defendant Zammas submits to this Court that the instructions given by the Trial Court in the instant case were unfair, misleading, inaccurate and denied him a fair trial. It is always incumbent upon the Trial Court to give a Jury charge, which, when viewed in its entirety, fairly and accurately states the applicable law. The Jury charge should never be tantamount to directing the Jury to bring in a guilty verdict. See United States v. Dardi, 330 Fed.2d 316 (2nd Cir.1964). A Jury charge, should, of course, never have the effect of confusing or misleading the Jury. United States v. Dillard, 101 Fed.2d 829 (2nd Cir. 1938). Further, the charge should define what conduct or participation constituted a crime and this must be proved. United States v. Gillian, 288 Fed.2d 796 (2nd Cir. 1961)

It must be reemphasized here that the Trial Court may not direct a verdict of guilty no matter how conclusive the evidence. All the material issues of fact must be left to the Jury for resolution. See United Brotherhood of Carpenters and Jointers of America v. United States, 330 U.S. 395, 67 Sup. Ct. 775 (1947) and United States v. Murdock, 290 U.S. 389, 54 Sup.

Ct. 223 (1933).

The charges in the instant case will be examined in light of the above authorities. Defendant will first address himself to the Governments requested Jury Instruction No. 24, which, over strenuous objection, the Court gave to the Jury. This charge read as follows:

> "If you find that consideration has been promised for an article which will be circulated by mail, then you must determine whether the promise or amount of consideration has been made public or disclosed.
>
> If you find that the money was transferred secretly, that will be sufficient to satisfy the third element."

It is this charge that had the effect of directing a verdict as to an essential element; the question of intent. The Court itself recognized, during the argument at the close of all the evidence, that the cash payment was at least some proof of the intent of the defendant as to disclosure of the payment.[1] Clearly the Court could not instruct the Jury that this, in and of itself, was sufficient to satisfy the element of nondisclosure; especially in light of the fact that the defense conceded the fact that the money itself was paid. The defense's position was simple. The payment itself was legal under Federal law if disclosure of the payment was made. Whether the defendant, Thomas Zammas, intended nondisclosure was an issue of fact that the Government had the burden of

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[1] This statement by the Court occurred during a colloquy between defense counsel and the Court. (Tr.1001)

proving. It was argued on behalf of the defendant that the Government had failed to prove that nondisclosure was the intent of the defendant. The complained of instruction was an inaccurate and unfair statement of the applicable law. The Court erred in giving this instruction. In effect, the instruction given by the Court had the effect of directing the Jury to bring back a verdict of guilty. Based upon the defense's position taken in this case, the question of intent not to disclose and the subsequent nondisclosure is a key issue. The defendant put on a defense in this matter which showed that even if Aiken had disclosed his interest to the publisher, this interest would not have been disclosed in the newspaper. This testimony, by Edward Crooker, Comptroller of the Value Line Investment Services, affirmed the existence of a "good faith" policy by Value Line indicating that only the interests of officers and directors would be disclosed in the newsletter. Mr. Crooker's testimony further established that any conflicts or interests of employees, such as Aiken, need only be disclosed to the corporate legal counsel who would take internal steps to insure that no prejudice affected the interests of the subscribers of the service. It was the defendant's position that, based upon such testimony, an equally reasonable hypothesis could exist; that Aiken had disclosed his gratuity and his interest to either the publisher or the corporate legal counsel, and the Value Line

Investment Survey determined of its own volition not to divulge said interest. If this be the case, the defendant Zammas would have clearly been exculpated under the terms of the Statute. Therefore, the question of intent to not disclose was a key question before the Jury. As such, the Court's instruction in this matter relating to the method of payment was highly inappropriate. If the Court had, in effect, said that you might find a secret payment evidence of an intent not to disclose, the Jury would have been free to judge the facts by itself. The Court's instruction clearly usurped the function of the Jury and clearly denied the defendant a fair trial.

The Trial Court had agreed to give defendant's requested Jury Instruction No. 21. This request read as follows:

> "The Government must prove beyond a reasonable doubt that the defendants published or circulated the article describing Power Conversion stock in the September 29, 1972 issue of Value Line Selection and Opinion or that they aided and abetted the publication of said article. <u>You are instructed that a publisher is one who issues or causes to be issued printed matter for</u> sale or circulation."

The defense relied upon the Court's statement that this charge would be given. An integral portion of the defense was the legal position that Aiken was not a publisher. Further, Aiken could not possibly have caused the article to be published,

since, according to his own testimony, the final decision as to what was or was not to be published belonged to Arnold Bernhard himself. (Tr. 264-267) Arnold Bernhard had the absolute control as to what articles would be published in the Selection and Opinion. This was argued by the defense to the Jury. This argument, inferentially, was based upon testimony again adduced at trail that Bernhard had the ultimate say on what was to be published and what was not to be published and that Aiken's position as editor was to merely prepare material for Bernhard's approval.

As part of their deliberations, the Jury, in order to convict the defendant would necessarily have to find that Zammas "published or caused to be published" the article in question. The defense submitted that this, was in fact, impossible. Since the defendant Aiken could not publish nor cause the article to be published, defendant Zammas could not aid or abet him in so doing. The evidence established the only one who could publish or cause an article to be published would be Arnold Bernhard himself.

The requested instruction called to the attention of the Jury the obligation of the Government to prove this crucial element. When the Court was advised that it had failed to give the instruction, its only comment was to

the effect that this issue was not really in dispute. The failure of the Trial Court to give the requested instruction constituted reversible error. As indicated elsewhere in this brief, the Trial Court had, during closing argument, indicated that "defense counsel was misleading" the Jury. Here was another instance where defense counsel had relied upon what the Court had indicated it would instruct the Jury and argued that the Court would so instruct the Jury. The Court failed and refused to so instruct the Jury causing the Jury to believe again that defense counsel had misled them. Clearly this was error. Clearly this was prejudicial error. Clearly the defendant should be entitled to a new trial thereupon.

The Trial Court gave the Government's requested Jury Instruction No. 19 and rejected the defendant's requested Instruction No. 20. The Government's requested Instruction No. 19 was and is a misleading and inaccurate statement of the law. The third portion of the Government's requested Instruction No. 19 completely eliminated the element of intent. It must have been the intent of Zammas that there be a nondisclosure of the payment. A reading of the Government's charge shows that it fails to include this as part of the burden of the prosecution. This is most convenient because the Government failed to prove during the course of the trial, any intent on the part

of the defendant, Zammas.[1]

The defendant's request No. 20 included the element lacking in Government's No. 19. The Jury, instead of being given an accurate instruction as to the essential portions of this particular element of the crime, was given an incomplete statement as to what elements the Government was required to prove.

It is submitted by Zammas that the instructions, as a whole, were inaccurate and misleading. They failed to properly advise the Jury as to what proof was required by the Government. Further, they failed to give the Jury the necessary guidance to enable them to reach an intelligent verdict.

It is respectfully submitted that the charges to the Jury failed to give the defendant Zammas a fair trial and that the defendant Zammas is entitled to a new trial on the charges against him.

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[1] It is interesting to note that the Government had in both a Pre-trial memoranda relating to the testimony of Stanley Perlmutter and in its response to defendant's request for a bill of particulars indicated it would prove the intention of the defendant Zammas not to disclose by direct proof. It failed to do so.

POINT III

The Trial Court erred in failing to grant defendant Zammas's motion for judgment of acquittal at the end of all of the evidence, when such motion should have been granted as a matter of law.

The Government failed to show that the defendant Zammas intended that payment for the article not be disclosed.

It was an essential element of the crime charged that the defendant intend nondisclosure of the payment of a gratuity to a financial newsletter for publication. Where a person makes a nondisclosed payment to another to publish an article describing a security, this creates a violation of 15 U.S.C. 77 q(b). If that person does not intend to disclose said payment, it is the Government's burden to prove that intent through competent proof. At the trial in the instant case, the burden was upon the Government to prove beyond and to the exclusion of every reasonable doubt, that the appellant had the requisite intent to keep secret the fact that the article was paid for and that payment was to be undisclosed in that article. The payment of Fifteen thousand dollars by the Appellant to the defendant, Aiken, was not illegal under 15 U.S.C. q(b) unless it was intended by the Appellant that it was to be undisclosed. It is this wilfull intent of nondislcosure that was not established by the evidence at trial.

It is submitted that the District Court erred in finding an inference from the evidence that the Appellant wanted the payment to be nondisclosed. The test for the validity of an inference from circumstancial evidence in the Second Circuit is:

> ". . .always whether the Jury may rationally infer the ultimate fact to be proved from the basic facts, whether established by circumstancial or testimonial evidence in the surrounding circumstances of the crime." United States v. Glasser, 443 Fed.2d 994 (2nd Cir. 1971)

In the case at bar the record is devoid of any competent evidence pointing to the Appellant's intent to perpetrate a fraud by nondisclosure pursuant to the aforementioned Statute. The Appellant did not tell the defendant Aiken not to disclose that he was paid to write the article. As a matter of fact, the testimony adduced at trial was that the stock would go up on the rumor of an article, and would come down upon the actual publication, irrespective of disclosure or not. The only shred of evidence pointing to a possible circumstance showing intent was brought out at trial by the Court. During the defense's closing the Judge made a factual conclusion that the Jury could infer that the payment agreement was, through a tacit understanding between Appellant and defendant Aiken, that payment be nondisclosed. (Tr.1001)

Besides being a highly prejudicial comment for the Court to make in front of the Jury, the inference of intent of non-disclosure is not valid from the circumstantial evidence offered to prove same.

It was the position of the Court that it could be reasonably inferred that defendant Zammas intended that the payment be nondisclosed because the payment was in cash. This cash payment and the alleged secret method of payment were the only circumstances which the Judge relied upon to infer the element of intent not to disclose. It is respectfully submitted that the manner and method of payment do not reflect at all upon the intent of the defendant Zammas, but at best might tend to reflect on the intent of the defendant Aiken which was never disclosed to the defendant Zammas.

The record shows that the defendant Aiken requested cash from defendant Zammas because Aiken had had previous dealings with Zammas. These prior dealings caused him not to trust the defendant Zammas. Irrespective of what the nature of these dealings was, it is clear that the inference which the Court may have drawn from the evidence does not find any support in the evidence itself. The only profferred inference which may be drawn from the payment of cash is that inference which was testified to by Aiken himself. In other words, he requested the cash because he felt a check might bounce and didn't trust

an I.O.U. At no time did Aiken, or any other witness, testify that the cash payment was for the purpose of a secret payment to be nondisclosed to anyone else. (Clearly, payment in cash being the only mode of payment acceptable to the defendant Aiken does not show that Defendant Zammas was ever interested in the question of the disclosure of the payment. We call to the Court's attention that cash is legal tender and the use of cash in and of itself does not, outside other circumstances, give rise to a presumption of illegal intent.)

The question becomes whether the method of payment in conjunction with the manner of payment, would create the inference which the Court sought to rely upon. The method of payment which the Court describes as "secret" was never established by the evidence to be a secret payment or a secret meeting. The testimony is that on the day the payment was made, the Defendant, Aiken, informed the defendant Zammas that the article had been done. Further, that he would be glad to deliver to the defendant Zammas copies of the article in return for which payment was to be made. The defendants agreed to meet that night at a public restaurant in the City of New York whereby the exchange of proofs of the article for the payment would be made. It was testified that both defendants excused themselves from the table to transact their business. The testimony adduced at trial indicated that the purpose for this was not to transact business in front of the respective girlfriends. It is also

clear from the trial record that Aiken himself made no effort to hide the payment, or what he was doing, from the woman who was at that time, his fiance. There was some testimony by the defendant Aiken that the meeting and exchange took place in the men's room of the restaurant. Apparently this was the desire of the defendant Aiken and not of the defendant Zammas. There is no evidence pointing to the defendant Zammas's alleged desire that the payment be nondisclosed. It is fundamentally unfair and incorrect for the Court to have assumed that the defendant Zammas intended nondisclosure absent competent circumstantial evidence from which the Jury could draw a reasonable inference. The Government indicated in both Pre-trial memoranda referred to elsewhere in this brief that it would prove the specific intent of nondisclosure. This it failed to do.

The Government failed to show that the Appellant published the article in Value Line Selection and Opinion.

The Trial Court found that the Appellant had a duty to disclose that the article had been paid for. This is fundamentally incorrect since the Government failed to prove that the Appellant, or the defendant Aiken, had published the article. The Government also failed to prove that the defendant Zammas or the defendant Aiken fraudulently gave publicity to a security through the article. Defendant Aiken's testimony showed that it was the Arnold Bernhard Company which publishes the Value Line Selection and Opinion. The defendant introduced into evidence

a good faith disclaimer showing that Arnold Bernhard and Company's policy of not disclosing employee interests in stock in its Selection and Opinion magazine had been reviewed and approved by the Security and Exchange Commission. (R 1008) At best, Zammas paid the editor, Aiken, to write an article. There was no evidence from which an inference could be drawn that Zammas published the article, or caused it to be published, without disclosure of the payment.

Arnold Bernhard and Company, as publisher, failed to disclose the payment in the article. Bernhard and Company's public policy of "good faith" proves that, irrespective of Zammas's intentions, gratuities and interest of non-officers and directors would not be disclosed in Selection and Opinion.[1]

Having accepted payment for the article, the duty to disclose fell upon the defendant Aiken. He should have informed Bernhard and Company pursuant to the company rules. There is no proof that he failed to do so; i.e. (Even though Bernhard and Company is not responsible for the public's reliance on the articles printed in its publication, as per their good faith policy, the publisher itself is responsible for disclosing payment for articles published in its newsletter).

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[1] At trial, it was established that Aiken was neither an officer or director of Arnold Bernhard and Company, Inc. and that even if he had disclosed to the company his gratuity, the company would not publish the disclosure. In truth and in fact, as adduced at trial, when the eventual payment was given general publicity in the press at the time of the indictment of the defendants Aiken and Zammas, Selection and Opinion did not publish anything with regard to same.

The Appellant paid to have the article published for which he expressed no intent that the payment not be disclosed. Clearly, he did not violate the Statute for he did not have, as a condition precedent to its publication, a condition that payment be nondisclosed. Clearly the duty is on the publisher to disclose. There is no evidence supporting the indictment charge that the Appellant published the article or that he intended the article be published for "an undisclosed payment". The above argument refers primarily to Counts 7-12 of the Indictment. However, it is respectfully submitted that if Counts 7-12 fail to establish a crime by the defendant Zammas, Counts 1-6 must necessarily fail.

In order to violate the mail fraud statute, one must participate in a "scheme or artifice" to defraud. (18 U.S.C., Section 1341) In the instant case, the scheme or artifice to defraud was charged as follows in the Indictment;

> "(a) The defendants William Rodman and Thomas Zammas, who were dealing in the common stock of Power Conversion, Inc., and promoting the sale thereof, would and did secretly pay a fifteen thousand dollar bribe to defendant Eric Aiken in return for which the defendant, Eric Aiken agreed to write and publish an article in Value Line Selection and Opinion commending the purchase of Power Conversion stock without disclosing the material fact that the defendant, Eric Aiken, had received and accepted a bribe."

As the anti-touting statute clearly indicates, such a gratuity, if disclosed, is proper and not fraudulent.

Hence, to take the position that the defendant Zammas

could be guilty of mail fraud and not guilty of the anti-touting provision, would create an incongruity. This would, in effect, attempt to make illegal an act specifically made legal. In other words, if the anti-touting statute authorizes a gratuity under certain circumstances, then, if complied with, it could not possibly be a scheme and artifice to defraud as there could be no fraudulent intent to do a perfectly lawful act. The Government failed to come to grips with this point and the Court failed to understand its viability. However, when viewed in the proper perspective, it is clear that one cannot be convicted of doing an act which is lawful; nor can one be convicted of having an illegal scheme or artifice to defraud when one's "scheme and artifice" is a legal action recognized by statute. The Government failed as a matter of law to prove its case beyond the exclusion of a reasonable doubt. It is therefore suggested that the decision of the Court be reversed.

POINT IV

The Trial Court erred in denying the defendant's motion for mistrial when it became apparent that the Government had denied to the defense Brady material.

At the close of the trial, counsel for defendant Rodman announced to the Court that he had a "good faith" belief that the Government had withheld from the defense favorable evidence known to the government. It was the contention of counsel for defendant Rodman that the Government had specific knowledge that Denise Gennaro had testified recently before a Grand Jury convened in the Southern District of New YOrk and had stated that during the months of August, September and October of 1972, that she was not, at any time, in the city of New York.

During the trial, a principal Government witness, Robert Wymbs, testified that during September of 1972 he was present in an apartment in New York City with the defendant Zammas, the defendant Rodman and Miss Gennaro, at which time the Value Line gratuity was discussed and money displayed. (Tr.446) Wymbs further testified that there were conversations held, participated in by Miss Gennaro, that indicated sums of money were to be paid for the publication of the article and the means and methods of the payment.

The Government, at the time that defendant Rodman's counsel informed the Court of the alleged denial of evidence,

admitted in open court that it had such evidence, but denied that it had to supply this information to Rodman's counsel as he knew or should have known about it anyway. The Government indicated that Rodman's counsel represented Miss Gennaro on several occasions; that Miss Gennaro was a "close" personal friend of the defendant, Rodman; and further, was a friend of Rodman's counsel, Berger. The Government did not argue at that time, nor did it argue at any time, that counsel for defendant Zammas represented Miss Gennaro. The sole Government argument with regard to the defendant Zammas was that he should have known about Miss Gennaro and her testimony as he had sat at counsel table with Rodman's counsel for a period of nearly eight (8) days in the instant case.

The United States Supreme Court stated in the landmark decision of Brady v. Maryland, 83 Sup. Ct. 1194 (1963) the following:

> "We hold now that the suppression by the prosecution of evidence favorable to an accused upon request, violates due process where the evidence is material to either guilt or punishment irrespective of the good faith or bad faith of the prosecution."

The essence of the Brady decision was to guarantee to a defendant a fair trial. It was held by the United States Supreme Court that society wins not only when the guilty are convicted, but when criminal trials are fair. And, it was specifically held in the Brady case that criminal trials cannot be fair, if the Government knowingly withholds evidence favorable to a defendant which could be used to the defendant's advantage

in his defense of a criminal prosecution.

The prosecution's duty to disclose false testimony by one of its witnesses is not to be limited to those situations where the prosecution knows that a witness is guilty of the crime of perjury, but, in those situations where the prosecutor had reason to believe his witness may be giving misleading testimony. United States v. Hanes, 498 Fed.2d 1164 (3rd Cir. 1974). Clearly in the instant case, the Government, based upon the testimony of Miss Gennaro, which may or may not have been substantiated by documentary proof, should have indicated that she may not have been present at a meeting as described by the Government witness, Wymbs. If the Government had either investigated the testimony of Miss Gennaro, or merely was cognizant of same, it clearly knew, or at least had reason to believe that the Government witness Wymbs was giving misleading testimony as to the meeting. Based upon the Hanes decision, Supra, this would be one instance where the denial of the favorable evidence would serve to cause an unfair trial.

The question presented in discussing any Brady determination is whether the testimony, or the evidence withheld, would be exculpatory; and then, whether the effects of this exculpatory testimony would have been material. It is the contention of the defendant Zammas that the testimony of Miss Gennaro would have been highly exculpatory and that its effects would certainly have been material.

Clearly, her profferred testimony would severely disturb the credibility of the Government's witness Wymbs, or, if Miss Gennaro was, in fact, nowhere near New York City in September and October, the meeting Wymbs testified to attending could not have occurred. The significance of the alleged meeting can clearly be inferred from the record, as the meeting was, according to Wymbs, the time during which the funds allegedly paid defendant Aiken were displayed and the disbursement discussed. Clearly, testimony showing that no such meeting had ever taken place would have been most exculpatory.

It was also material. Initially, it would show to the Jury that there were serious defects in the Government's case both as to the credibility of this individual witness and the credibility of the Government's case as a whole. A growing number of Courts have recognized that suppressed evidence's materiallity requirement may be satisfied even though such evidence would do no more than affect the credibility of a witness whose testimony prejudiced the defendant's case. Powell v. Wyman, 287 Fed.2d 275 (5th Cir. 1961) and by implication in United States v. McFarland, 371 Fed.2d 701 (2nd Cir. 1966)

This Court expressly recognized the materiality of exculpatory evidence for the purposes of impeachment in United States v. Consolidated Laundries Corp., 291 Fed.2d 563 (2nd Cir. 1961) wherein it held that although it was impossible to know whether the result of the trial would have been different,

no one could tell what might have happened if the Government's principal witness could have been effectively examined. See also, Giglio v. U.S., 92 Sup. Ct. 763 (1973).

In addition to the proffered materiality of the testimony to this point, it is important to note that the Government presented as it principal witnesses to the actual commission of the alleged crime, the following persons; Eric Aiken, Stanley Perlmutter, Susan Aiken, Pericles Constantino, Allen Umbogy and Stephanie Palumbo. Other than Miss Palumbo, and the Government witness Wymbs, each of the other major Government witnesses had discernable infirmities as to their credibility which could be cogently demonstrated to the Jury. Mr. and Mrs. Aiken both were admitted perjurers. Stanley Perlmutter was testifying under the terms of an agreement with the Government and still invoked the Fifth Amendment several times during the course of his testimony. Mr. Constantino and Mr. Umbogy both were testifying under agreements with the Government. Both had been convicted or were to plead guilty to crimes arising out of security violations. Therefore, out of all of the Government's principal witnesses as to the commission of the actual offense, only Wymbs and Palumbo were apparently free of testimonial infirmities. Clearly, evidence which would have reflected on Wymbs's credibility as damaging as Miss Gennaro's testimony would have been, would have been of great help to the defense.

Therefore, the testimony of Miss Gennaro would have been both material and relevant. The position of the Government at trial relating to the defendant Zammas was summed up in the Government's memorandum of law which stated:

> ". . .the Government knows that Miss Gennaro was a close friend of the defendant Zammas. . .the Government is entitled to assume that any information that Miss Gennaro may have that may have been helpful to the defense was known to the defense, and thus, the Government is under no burden to disclose anything."

There is nothing in the record but a bare faced assertion by the prosecutor that Miss Gennaro was a friend of the defendant Zammas. Further, the case law does not give the Government the right to assume, based on nothing more than the bare assumption itself, knowledge of favorable evidence; nor can same be imputed to a defendant. The Government presented absolutely nothing to indicate that the defendant Zammas could or should have been charged with knowledge of the testimony of Miss Gennaro. It was proffered to the Court during the argument of the Brady motion, that the defendant Zammas had not seen nor heard of the putative witness Gennaro for a period in excess of three (3) years.

The Government cited in support of its position one case in the memorandum of law, U.S. v. Ruggiero, 472 Fed. 2d 599 (2nd Cir. 1973).

Ruggiero was cited to show that where the defendant already had knowledge of the availability of exculpatory testimony, the government is not required to furnish same. However, the government's position with regard to Ruggiero as applied to the defendant Zammas is totally untenable. What the government failed to inform the Trial Court was that in the facts of the Ruggiero case, the alleged exculpatory material was turned over to the Court for an "in camera" examination. The Court in Ruggiero exclaimed that such conduct could hardly be classified as suppression. In the case at bar, nothing was given to the trial judge in camera or otherwise. At all times material hereto, the evidence that was held by the government was never proferred to either the court or the defense.

Further, in the Ruggiero case, Ruggiero himself had knowledge, shown on the record, of the existence of the alleged exculpatory material prior to the trial. In that case, Ruggiero was aware personally of the grand jury testimony which may or may not have been exculpatory. In the present case, the only contention of the government was that the defendant Zammas knew who Gennaro was. The Government never attempted to argue that Zammas knew that Gennaro had testified in a manner which would serve to exculpate them. The government's only contention was that by sitting at counsel table with Defendant Rodman, Defendant Zammas should have received the Brady material by osmosis. The government had concluded that despite the fact that Rodman's counsel had never told

Zammas's counsel about Gennaro, they should have known anyway. As a matter of fact, Rodman's counsel stated on the record that he never at any time told counsel for Zammas about Gennaro's testimony. (Tr-1201-1230).

Since the Court had indicated in the side bar conference that witness Wymbs was one of the most effective government witnesses, the prejudice by the denial of the Brady material is clear. If the defendant Zammas would have been capable of showing this "most effective" witness had committed perjury, a different result might have occurred.

Therefore, as was held in U.S. vs. Gigglio, supra;

> "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the Brady rule."

Clearly, the reliability of Robert Wymbs could have been determinative of the guilt or innocence of Thomas Zammas. The nondisclosure of the evidence affecting the credibility of Robert Wymbs clearly falls within the Brady rule. Denial of this Brady material is grounds for a reversal of this conviction, and the granting of a new trial to the defendant Zammas.

CONCLUSION

Based upon the reasons, citations and arguments stated herein it is respectfully submitted that the Judgment of Conviction against Thomas Zammas should be reversed and the case remanded with a direction that he be acquitted, or, in the alternative, granted a new trial.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

THOMAS ZAMMAS, Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, **James A. Steele** *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* **310 W. 146th St., New York, N.Y.**

That on the **26th** *day of* **November** *1975 at* **1 St. Andrews Plaza, New York, N.Y.**

deponent served the annexed **Briefs** *upon* **THOMAS J. CAHILL**

the **Attorney** *in this action by delivering* **1** *true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this **26th** *day of* **November** *1975*

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0118950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE